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# In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD F. WILSON AND JEAN WILSON, PETITIONERS

*v.*

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture has authority to issue both term and revocable permits for recreational facilities within national forests.

2. Whether the court of appeals properly ruled that the Forest Service's determination, with the concurrence of the State Historic Preservation Officer, that the San Francisco Peaks did not possess a combination of "unique" attributes qualifying that entire 75,000 acre area for listing on the National Register of Historic Places was not arbitrary and capricious.

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-50) is reported at 708 F.2d 735. The district court's memorandum opinions (Pet. App. 51-90 and 91-99) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. Petitions for rehearing, filed by the Hopi Indian Tribe and the Navajo Medicinemen's Association in actions consolidated with petitioners' action, were denied on July 14, 1983, and July 26, 1983, respectively (Pet. App. 174-176). The petition for a writ of certiorari was filed August 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant portions of Section 1 of the Organic Administration Act of 1897, 16 U.S.C. 551; the Act of Mar. 4, 1915, 16 U.S.C. 497; and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528, are set forth as an appendix to this brief.

## STATEMENT

1. Coconino National Forest belongs to the United States. It was established by Presidential Proclamation No. 818 on July 2, 1908 (35 Stat. 2196). Congress has placed the administration of that national forest in the Department of Agriculture, pursuant to the provisions of 16 U.S.C. 482n, 482n-3, 497, 528, 531, and 551.

The San Francisco Peaks is a mountain that encompasses 75,000 acres and rises to 12,633 feet, the highest point in Arizona (Pet. App. 4-5). Ski facilities have existed within a 777 acre portion of the San Francisco Peaks since the mid-1930's (*id.* at 5). During this period, the United States Forest Service built a ski lodge at what is now the Snow Bowl picnic ground, and the Civilian Conservation Corps built a road to the lodge. The present ski lodge was built in 1956. The skiing facility utilized a rope tow as the primary uphill mode of transportation until 1958, when it was replaced by a Poma lift, which is still in use today. A chairlift was installed in 1962. With the exception of some trail widening and small surface installation the 777 acre permit area and facilities at the Snow Bowl have changed very little since 1962. *Ibid.*

The facility has been operated by various parties, and in April 1977 the special permit for the Snow Bowl Operation in the national forest was transferred to Northland Recreation, Inc. (Pet. App. 5). In July 1977, Northland submitted

to the Forest Service a master concept plan for future development within the existing permit area. The plan addressed the need for additional parking, lodge and uphill facilities, and additional slopes of varying skill levels.

In late summer 1977, the Forest Service solicited alternatives to the proposed plan as part of its environmental analysis (Pet. App. 5). Ultimately, the Forest Service selected six alternatives to Northland's proposal, which were analyzed in a draft environmental impact statement. Special efforts were made to solicit comments from the Hopis and Navajos, who regard the area as sacred. *Id.* at 6.

On December 31, 1980, after intermediate administrative proceedings, the Chief of the Forest Service issued a final agency decision. The alternative selected by the Forest Service provided for considerably less development than the master plan proposed by Northland (Pet. App. 133-146). The decision allowed a limited expansion of the Snow Bowl ski area within the existing permit boundaries and allowed improvement of the Arizona Snow Bowl Road under the dual permit system.

Under the dual permit system the Forest Service issues a long-term permit to build major improvements within 80 acres or less for a maximum of 30 years pursuant to 16 U.S.C. 497, together with a revocable permit to build less permanent improvements such as ski trails, under 16 U.S.C. 551, which contains no limitation on acreage.

2. Three suits were filed to prevent the Forest Service from issuing permits to authorize the improvement of the recreational facilities within the Snow Bowl area. The suits by the Hopi Tribe and the Navajo Medicemen's Association allege that the existence of — let alone the expansion of — a ski facility on the San Francisco Peaks violates the Indians' free exercise rights under the First Amendment; the

American Indian Religious Freedom Act, 42 U.S.C. (Supp. V) 1996, an alleged trust responsibility between the federal government and Native Americans, and various environmental laws. In their suits, the Indian plaintiffs sought to have the existing facilities dismantled and removed. Pet. App. 52. Petitioners, the Wilsons, non-Indians who own nearby Fern Mountain Ranch, contend that the Forest Service's proposed actions violated the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.*, regulations promulgated thereunder, 36 C.F.R. Part 800, and statutes regulating the management of the national forests. Petitioners argued first, that the Forest Service had violated the NHPA with respect to two National Register properties (one being petitioners' ranch) in the vicinity of the Snow Bowl; and second, that the Forest Service did not comply with the Act in declining to include the San Francisco Peaks in the National Register. Pet. App. 75-89.

All parties filed cross-motions for summary judgment. On June 15, 1981, the district court entered summary judgment in favor of defendants on all claims with the exception of that arising under the NHPA (Pet. App. 51-92). The court found that the Forest Service had committed three violations of the NHPA and its implementing regulations. First, the Forest Service had failed to examine the project area to identify properties eligible for inclusion in the National Register of Historic Places. Second, the Forest Service had failed to consult with the Arizona State Historic Preservation Officer (SHPO) about the effect that the alternative preferred by the agency would have on the National Register properties near the Snow Bowl — Fern Mountain Ranch, owned by petitioners,[1] and the C. Hart

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[1]Petitioners specifically argued that since the new ski lifts and slopes would be visible from their ranch, there would be an "adverse effect" under 36 C.F.R. 800.3(b), and the increased tourist traffic would

Merriam Base Camp. Third, the Forest Service had failed, as required by 36 C.F.R. 800.4(a)(1), to consult with the SHPO about the eligibility of the San Francisco Peaks for inclusion in the National Register. The NHPA claim was remanded to the Forest Service, and the Forest Service was enjoined from permitting any improvement of the ski facility pending administrative remand proceedings. After completion of the administrative remand proceedings, the federal defendants filed a motion for entry of final judgment accompanied by a Notice of Compliance; the Indian plaintiffs filed motions under Rule 60(b), Fed. R. Civ. P., seeking relief from the June 15, 1981 judgment. Pet. App. 94-95.

On May 14, 1982, the district court denied the Indians' motions and granted the federal defendants' motion, finding that the agency proceedings on remand had satisfied the requirements of the NHPA (Pet. App. 93-102). Accordingly, the court vacated the injunction that had prevented the Forest Service from issuing the permits for the Snow Bowl improvements. The court of appeals, in a detailed opinion, affirmed (Pet. App. 1-50).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. *The Secretary of Agriculture has authority to issue both term and revocable permits for recreational facilities.* — Petitioners contend (Pet. 10-30) that the court of appeals' decision sustaining the issuance of term and revocable permits under the dual permit system "nullifies" 16 U.S.C. 497. At issue are two permits. One is a 20-year term

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increase the dangers of trespassing, vandalism and arson at their ranch. The Forest Service and the court of appeals analyzed and rejected these contentions. Pet. App. 39-40.

permit issued pursuant to the Act of Mar. 4, 1915, 16 U.S.C. 497. This permit provides for the use of 24 acres of national forest land for ski lifts and tows, shelters, a lodge, and a shuttle bus system. All permanent structures are confined to this 24 acre area. The second permit is a revocable permit issued pursuant to the Act of June 4, 1897, 16 U.S.C. 551. It provides for the use of 753 acres for ski slopes and trails. Petitioners argue that the 80 acre limitation set out for term permits by the Act of Mar. 4, 1915 (16 U.S.C. 497) limits the Forest Service's authority to issue permits for recreational uses to 80 acres.

The Secretary's authority is derived from Congress' plenary power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3. *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954). This power is delegable and has here been delegated to the Secretary of Agriculture. See, *e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336-338 (1963).

Congress has authorized the Secretary of Agriculture "to regulate [the] occupancy and use" of national forests. 16 U.S.C. 551. The Multiple-Use Sustained-Yield Act of 1960 directs him to accomplish this by balancing many potential uses of national forest lands: outdoor recreation, range, timber, watershed, and wildlife and fish purposes. 16 U.S.C 528. He is authorized to issue 30-year leases for up to 80 acres of national forest to be used for "hotels, resorts and any other structures or facilities necessary or desirable for recreation." 16 U.S.C. 497. He has, in addition, power to permit the use of larger areas of the public domain through nonexclusive, revocable special use permits for such purposes as ski slopes and attendant equipment, so long as that is consistent with national forest purposes. 16 U.S.C. 551.

Petitioners claim that Section 551 does not allow the issuance of permits for recreational purposes (Pet. 12). As support for this sweeping proposition petitioners rely on *United States* v. *New Mexico*, 438 U.S. 696 (1978), in which this Court held that the United States did not have the power to reserve use of the water of the Rio Mimbres for the Gila National Forest. The Court ruled that the Organic Administrative Act of 1897, of which Section 551 is a part, allows reservation of national forests only for the purpose of conserving waterflows or furnishing a continuous supply of timber, and not for recreational or other purposes.

*United States* v. *New Mexico, supra*, however, is inapposite to the instant case. What is at issue here is not whether the United States can *reserve* land or water for recreational purposes, but whether it can allow national forest lands, already properly reserved, to be *used* for recreational purposes. In *New Mexico*, the Court noted that the Multiple-Use Sustained-Yield Act of 1960 made it clear that the purposes for which national forest lands can be administered are broader than the purposes for which they can be reserved. 438 U.S. at 713. Congress has specifically stated that recreation is one of the purposes for which the National Forests are to be used. 16 U.S.C. 528.

Moreover, the Secretary's power to issue revocable recreational permits under Section 551 is supported by long and recognized administrative practice. From the early part of the twentieth century Congress has recognized that the Secretary could issue permits for recreation. See 52 Cong. Rec. 1787 (1915) (remarks of Rep. Hawley). More recently, in 1956, Congress recognized that the Secretary "now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551)." H. R. Rep. No. 2792, 84th Cong., 2d Sess. 2 (1956). The issuance of revocable permits under Section 551 in conjunction with

issuance of more permanent permits under Section 497 is also of long standing. In approving the practice of issuing dual permits to ski resort operators, the Ninth Circuit noted that at that time there were at least 84 recreational developments on national forest lands which combine use of a fixed-term lease for lands on which permanent structures are erected and a revocable permit for surrounding lands used for recreation.[2] *Sierra Club* v. *Hickel*, 433 F.2d 24, 35 (9th Cir. 1970), aff'd on other grounds, 405 U.S. 727 (1972). In the instant case, the court of appeals, citing S. Rep. 94-1019, 94th Cong. 2d Sess. 8 (1976), noted that "[t]here are presently about 200 ski developments in national forests and most of them employ dual permits" (708 F.2d at 759; Pet. App. 48).

After a lengthy discussion of the history of the Secretary's practice of issuing recreational permits and congressional approval of it, the court of appeals wrote (Pet. App. 47):

> We conclude, then, that the Secretary has consistently interpreted the Act of 1915 as *not* limiting his authority to issue revocable permits under the Act of 1897; that Congress has for decades had knowledge of the Secretary's interpretation, but has never objected;

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[2]Some recreation projects, the Ninth Circuit noted, 433 F.2d at 35, exceeded 6,000 acres. The Forest Service has, since 1908, authorized issuance of revocable special use permits for such uses as residences, farms, dairies, schools, churches, telephone and telegraph lines, stores, saw mills, factories, hotels, summer resorts, dams, reservoirs, water conduits and power lines. Many such structures were costly. As of 1908, the Forest Service had granted approximately 63,000 term and revocable permits authorizing 80 different uses of national forest lands. At the 1967 hearings, the Associate Chief of the Forest Service explained that approximately 53,000 of these permits involved improvements whose value was estimated to exceed $1 billion. *Management Policy and Other Problems of the National Forests, Hearings Before the Subcomm. on Forests of the House Comm. on Agriculture*, 90th Cong., 1st Sess. (Pt. 2) 2-4 (1967).

> and that on the one occasion when Congress did comment on the Secretary's interpretation and practice, in 1956, it expressed approval. Under these circumstances the Secretary's authority to issue revocable permits under § 551, whether or not exercised in connection with dual permits, cannot be doubted.

In this context, surely, the court of appeals was plainly correct in sustaining this long-standing administrative practice. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. *The court of appeals properly sustained the determination by the Forest Service and the State Historic Preservation Officer that the entire San Francisco Peaks were not eligible for listing.* — Petitioners challenge the decision not to designate the San Francisco Peaks as an entry in the National Register on two grounds. Petitioners first complain (Pet. 28) of the failure to submit the question of the eligibility of the San Francisco Peaks for inclusion in the National Register to the Secretary of the Interior. They contend that this failure violates regulations that explicitly make him the final arbiter when the Forest Service and the SHPO disagree. 36 C.F.R. 63.2(c). The short answer, as the court recognized (Pet. App. 40-41), is that, because both the Forest Service and the SHPO agreed that the property was not eligible, there was no need to refer the matter to the Secretary of the Interior. No disagreement existed for him to resolve.

Petitioners' second contention is that the agency and SHPO abused their discretion in determining that the Peaks did not possess the requisite "unique" attributes for listing on the National Register. The court of appeals properly declined to substitute its discretion for that of the adminstrative decisionmakers. This fact-bound issue presents nothing for further review. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. Act of Mar. 4, 1915, 16 U.S.C. 497 provides:

> The Secretary of Agriculture is authorized under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining building, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests.

2. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 provides:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

3. Organic Administration Act of 1897, 16 U.S.C. 551 provides:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or

both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of title 18.